Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

KELLENBERG MEMORIAL HIGH SCHOOL
and CHAMINADE HIGH SCHOOL,

Petitioners,

v.

SECTION VIII OF THE NEW YORK STATE PUBLIC
HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

JOHN M. SPELLMAN
Counsel of Record
SPELLMAN & WALSH, LLP
Attorneys for Petitioners
229 Seventh Street, Suite 100
Post Office Box 7775
Garden City, New York 11530
(516) 747-1640

Of Counsel:

JOHN E. RYAN
JOHN P. GIBBONS, JR.
BENJAMIN J. TRUNCALE, JR.

156325

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. Whether the blind referendum voting procedure employed by the Respondent athletic association, a state actor, is violative of due process and equal protection as guaranteed by the United States Constitution.

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Petitioners, Kellenberg Memorial High School and Chaminade High School, respectfully request that a writ of certiorari issue to review the Decision & Order of the Appellate Division, Second Department, dated and entered November 2, 1998, which affirmed the judgment of the Supreme Court, Nassau County denying Petitioners' petition and dismissing this proceeding. *Kellenberg Memorial High School and Chaminade High School v. Section VIII of the New York State Public High School Athletic Association, Inc.*, 255 A.D.2d 320, 679 N.Y.S.2d 660 (2d Dep't 1998).

OPINIONS BELOW

The Court of Appeals of the State of New York, by Order, dated and entered September 2, 1999, 93 N.Y.2d 816, __ N.Y.S.2d __ (1999), denied Petitioners' motion for leave to appeal from a Decision & Order of the Appellate Division, Second Department, dated and entered November 2, 1998, 255 A.D.2d 320, 679 N.Y.S.2d 660 (2d Dep't 1998), affirming the judgment of the Supreme Court, Nassau County (Ain, J.), entered September 23, 1996. The Order of the Court of Appeals, the Decision & Order of the Appellate Division, and the judgment of the Supreme Court are set forth in the Appendix at D, A and C, respectively.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals was entered on September 2, 1999. *See* Appendix at D. This Petition is filed within ninety (90) days after the entry of that Order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

The sole issue raised by this Petition is whether the blind referendum voting procedure employed by the Respondent athletic association, a state actor, is violative of the United States Constitution.

Toward that end, in *St. Augustine High School v. Louisiana High School Athletic Association*, 270 F. Supp. 767 (E.D. La. 1967), the District Court stated unequivocally that such a procedure is ". . . in and of itself violative not only of the equal protection clause, but of the basic due process guarantees of the Constitution." On appeal, the Fifth Circuit Court of Appeals affirmed, concluding:

> If the applicant meets the standards no showing of hands can exclude it from becoming a part of this State activity.

St. Augustine, 396 F.2d 224, 228 (5th Cir. 1968).

Yet, the courts of New York State have reached an altogether contradictory conclusion with regard to the constitutionality of a blind referendum voting procedure. In *Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Association, Inc.*, 88 N.Y.2d 131, 643 N.Y.S.2d 928 (1996), the Court of Appeals, rejecting the applicability of *St. Augustine*, not only upheld the constitutionality of a blind referendum voting procedure, but praised it as being ". . . the most elemental hallmark of the democratic process . . .". *Archbishop Walsh*, 88 N.Y.2d at 139.

The dichotomy between *St. Augustine* and *Archbishop Walsh* could not be more clear. It is equally clear that this Court should address the constitutionality of this procedure as it affects substantial constitutional rights throughout the State of New York. Indeed, if *St. Augustine* represents an accurate statement of the law, then the decisions of the New York State Courts effectively sanction a procedure which will permit the systematic violation of constitutional rights by a state agency without the opportunity for any judicial review.

B. Statement of Essential Facts

1. *The Parties*

In 1995, Petitioners, two Catholic High Schools, sought admission into the Respondent, a public high school athletic

association. The admission procedures adopted by Respondent for non-public schools specified:

> In accordance with the State Association's constitution as interpreted by the court, approved Friends and Neighbors Schools may apply and become members of Section VIII if approved by a referendum postcard vote of the member schools of Section VIII.

See Respondent's Constitution, Article III (R. 82).[1]

After submitting their applications, each Petitioner, a "Friend and Neighbor school", was visited by an Admissions Review Committee. Following these site visits, the Review Committee issued memoranda setting forth its findings and concluding that each Petitioner satisfied Respondent's objective criteria for admission (R. 136 and 139).

Nevertheless, each Petitioner was denied membership, without any explanation, solely as a result of an unfavorable referendum postcard vote (R. 143-144) following a campaign tainted by religious bias (R. 193-198).

2. *Preliminary Statement of Argument*

This nearly identical procedure for admission through a referendum membership vote also was at issue in *St. Augustine High School v. Louisiana High School Athletic Association*, 270 F. Supp 767 (E.D. La. 1967), *aff'd*, 396 F.2d 224 (5th Cir. 1968). In *St. Augustine*, the District Court

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1. References denoted as "R. __" are to the Record in the Appellate Division, Second Department.

considered the denial of membership in a state-sponsored athletic association to a private high school. St. Augustine High School had satisfied all membership requirements, except the necessary two-thirds vote for approval by the general membership.

The District Court found that St. Augustine High School's equal protection and due process rights were violated since the denial of admission was based solely upon the capricious vote of the membership of the state-sponsored athletic association. *See St. Augustine*, 270 F. Supp. at 774. The District Court ultimately concluded that, because the association had established the process for admitting non-public schools, no school could be denied membership on the arbitrary vote of its members. *See St. Augustine*, 270 F. Supp. at 777. In affirming, the Fifth Circuit Court of Appeals determined that participation in the state-sponsored athletic association could not be denied to applicants meeting the standards for admission on the basis of an adverse vote by those already fortunate enough to be participants and that, in so doing, the association denied St. Augustine High School equal protection and due process. *See St. Augustine*, 396 F.2d 224 (5th Cir. 1968).

In stark contrast to the only existing federal precedent on the subject, the New York State Court of Appeals in *Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Association, Inc.*, 88 N.Y.2d 131, 643 N.Y.S.2d 928 (1996) held that a blind referendum voting procedure is not violative of the Constitution. In reaching the same conclusion in the case at bar, the lower courts in New York expressly relied upon *Archbishop Walsh*. In refusing to review the merits of the instant case, the New York State Court of Appeals has

reaffirmed *Archbishop Walsh* as the law of New York, thereby placing it in direct opposition to *St. Augustine*.

The conflict between federal and New York State law will only generate constitutional uncertainty for both state-sponsored athletic associations and those seeking admission to such organizations. Inasmuch as a state court of last resort has decided an important federal question in a way that directly conflicts with the decision of a United States Court of Appeals, this Court should grant certiorari to resolve this fundamental disagreement as it impacts upon the rights of citizens throughout the State of New York.

C. History of the Case

1. *Before the New York State Supreme Court*

On February 16, 1996, Petitioners commenced this proceeding by the filing of a verified petition, alleging, *inter alia*, that Respondent's denial of Petitioners' membership applications violated Petitioners' rights to equal protection and due process (R. 13). The New York State Supreme Court denied Petitioners' request for a judgment declaring them to be members of the Respondent athletic association and dismissed, in their entireties, Petitioners' constitutional claims. Relying upon the decision in *Archbishop Walsh*, the New York State Supreme Court concluded that Respondent's blind referendum voting procedure had a rational basis and, therefore, ". . . did not run afoul of the Petitioners' equal protection rights" (R. 16) nor did it violate their due process rights (R. 20-21).

2. *Before the Appellate Division*

By Decision & Order, dated November 2, 1998, the Second Department of the Appellate Division of the New York State Supreme Court, relying on *Archbishop Walsh*, affirmed the judgment of the Supreme Court. *Kellenberg Memorial High School and Chaminade High School v. Section VIII of the New York State Public High School Athletic Association, Inc.*, 255 A.D.2d 320, 679 N.Y.S.2d 660 (2d Dep't 1998).

In a lengthy dissent, Justice Leo McGinity voted to reverse the judgment and remit the matter to the Supreme Court "... to afford the Petitioners an opportunity for discovery in order to determine whether the negative vote was in fact arbitrary and rooted in bias". *Kellenberg*, 255 A.D.2d at 326 (McGinity, J., dissenting). The dissent noted the similarities between the instant case and *St. Augustine*, particularly with reference to the potential for the referendum admission procedure being used to mask invidious discrimination:

> ... Chaminade and Kellenberg have asserted that they were denied procedural due process and denied admission based upon the fact that they were Catholic schools .... To support their claim, Chaminade and Kellenberg submitted to the court below certain correspondence written by athletic directors opposed to their application that was circulated among the member schools prior to the vote .... This correspondence, which can only be characterized as disturbing in nature, displays an anti-Catholic sentiment, pointedly referring to "The Rosary" as a proffered reason why Catholic

school athletic teams in the tri-state area have excelled, and would permit the reader to draw an inference of religious bias. For example, one of the documents posed the following questions:

*Question I:

Why are 8 of the 10 teams in the tri-state area Catholic Schools?

A) Catholics are the best players

B) The Rosary helps

C) They recruit

D) All 6'7" students must go to Catholic H.S.

Kellenberg, 255 N.Y.2d at 324 (McGinity, J., dissenting).

3. *The Court of Appeals*

By Order, dated February 16, 1999, the New York State Court of Appeals summarily dismissed the appeal ". . . upon the ground that no substantial constitutional question is directly involved." Subsequent efforts to obtain leave to appeal were denied by the Appellate Division and by the New York State Court of Appeals.

With no further review available from the courts of New York State, Petitioners now ask this Court for a writ of certiorari. Petitioners are seeking a final determination whether *Archbishop Walsh* or *St. Augustine* represents the law with regard to the constitutionality of a blind referendum

voting procedure as a requirement for admission to a state-sponsored athletic association. This case merits review by this Court because it involves issues that are of significant public importance, impacting upon the constitutional rights of applicants to state-sponsored associations throughout the State of New York, if not the entire country.

REASONS FOR GRANTING THE WRIT

I.

THE CONSTITUTIONALITY OF BLIND REFERENDUM VOTING FOR ADMISSION TO STATE-SPONSORED ATHLETIC ASSOCIATIONS MUST BE RESOLVED BY THIS COURT.

Approximately thirty-three (33) years ago, in *St. Augustine High School v. Louisiana High School Athletic Association*, 270 F. Supp 767 (E.D. La. 1967), the United States District Court considered the denial of membership in an athletic association to a private high school attended exclusively by black students. In that case, the athletic association had four qualifications for the admission of new members: (1) the applicant must be a Louisiana school; (2) the school must apply; (3) the school must agree to conform to the rules and regulations of the association; and (4) the school must be approved by a vote of two-thirds of the schools in the district in which it is to compete, and a vote of two-thirds of the general membership. *See St. Augustine*, 270 F. Supp at 773.

St. Augustine met all of these qualifications, except that it failed to achieve a two-thirds vote from the general membership of the association. Upon review, the District

Court acknowledged that St. Augustine had been denied membership ". . . solely on the basis of the capricious vote of the general membership . . ." of the defendant association involved. *See St. Augustine*, 270 F. Supp. at 774. The District Court found:

> . . . that the voting requirement provides the LHSAA with a painless and efficient method of denying membership to any high school it wishes without the embarrassing necessity of assigning a reason for the denial.

St. Augustine, 270 F. Supp. at 776. In so finding, the District Court concluded that:

> Where such wide discretion is the ready vehicle for a covert system of discrimination, the practice must be held in and of itself violative not only of the equal protection clause, but of the basic due process guarantees of the constitution. In this case, . . . there is simply no way of ascertaining positively why St. Augustine was refused membership . . . . The very fact of that impossibility is the best reason and rationale for prohibiting such subtleties as this voting provision from interfering with the very important rights of all citizens to the equal protection of the laws.

St. Augustine, 270 F. Supp. at 776-777.

Hence, the District Court recognized that the voting requirement clothed the Louisiana High School Athletic Association with an unbridled capacity to partake in the ". . . wholesale discrimination and arbitrary and capricious

treatment of any and all candidates for membership . . . ." *St. Augustine*, 270 F. Supp. at 777. As such, it was determined that the blind referendum voting requirement violated the Fourteenth Amendment of the United States Constitution. *See St. Augustine*, 270 F. Supp at 777.

The Fifth Circuit Court of Appeals, in affirming, held that an adverse vote by those already fortunate enough to be participants in the association could not be utilized to deny admission to qualified applicants. *See St. Augustine*, 396 F.2d at 228. As noted earlier, the Fifth Circuit Court of Appeals aptly posited its constitutional logic as follows:

> If the applicant meets the standards no showing of hands can exclude it from becoming a part of this state activity.

St. Augustine, 396 F.2d at 228.

Upon a thorough reading of both the District Court and the Court of Appeals opinions in *St. Augustine*, it becomes unequivocally clear that a state actor may not deny an individual participation in a state activity without proffering a basis therefor. Failure to provide any reason renders the denial of membership unconstitutional. *See St. Augustine*, 270 F. Supp 767 (E.D. La. 1967), *aff'd*, 396 F.2d 224 (5th Cir. 1968).

Faced with a similar, if not identical, issue in *Archbishop Walsh*, the New York State Court of Appeals reached an entirely contradictory conclusion, holding that the blind referendum voting procedure furthered the legitimate purpose of affording the member schools ". . . the opportunity to compete on a relatively level playing field", and thus was

not violative of the equal protection clause of the Constitution. *See Archbishop Walsh*, 88 N.Y.2d at 139.

Unfortunately for Archbishop Walsh and Petitioners, the Court failed to recognize the significance of the *St. Augustine* opinion and the proposition for which it stands. As indicated in *St. Augustine*, when a blind referendum voting procedure is employed by the State, such procedure ". . . is in and of itself violative not only of the equal protection clause, but of the basic due process guarantees of the Constitution." *St. Augustine*, 270 F. Supp. at 776. Therefore, when confronted with such a blind referendum voting procedure, one need not address the legitimacy of the State's *post-hoc* rationalization. Rather, the procedure itself is constitutionally defective.

Unlike the majority, *St. Augustine*'s true meaning was not lost by the dissenting Judge in *Archbishop Walsh*. Judge Titone, relying upon *St. Augustine*, concluded that:

> . . . because the referendum vote operates to exclude schools without reference to any objective or observable criteria, this type of State action is patently arbitrary and cannot rationally further the proffered legitimate State interest.

Archbishop Walsh, 88 N.Y.2d at 141 (Titone, J., dissenting).

Clearly, *St. Augustine* and *Archbishop Walsh* are in direct conflict with one another. This Court should affirmatively address the constitutionality of a blind referendum voting procedure as employed by the Respondent athletic association in this case. Toward that end, Petitioners echo the following question and answer, as posed by the District Court in *St. Augustine*, in an attempt to demonstrate to this

Court the need to resolve this fundamental controversy once and for all:

> What other state agency or association places such a burden on the citizens seeking its aid? Certainly the very thought of such an arbitrary vote by state officers or agents is abhorrent to the principles of the Fourteenth Amendment and every civil right of all citizens of this country . . . .

St. Augustine, 270 F. Supp. at 776.

Notwithstanding the abhorrence of the federal courts to a blind referendum voting procedure, the courts of New York State have elevated this very same procedure to the status of being ". . . the most elemental hallmark of the democratic process". *Archbishop Walsh*, 88 N.Y.2d at 139. If not reviewed by this Court, the future ramifications of this legal doctrine cast an ominous shadow over the rights of all citizens.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

JOHN M. SPELLMAN
Counsel of Record
SPELLMAN & WALSH, LLP
Attorneys for Petitioners
229 Seventh Street, Suite 100
Post Office Box 7775
Garden City, New York 11530
(516) 747-1640

Of Counsel:

JOHN E. RYAN
JOHN P. GIBBONS, JR.
BENJAMIN J. TRUNCALE, JR.

APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED NOVEMBER 2, 1998

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

97-02211

In the Matter of Kellenberg Memorial
High School, et al.,

Appellants,

v.

Section VIII of the New York State Public High School
Athletic Association, Inc.,

Respondent.

GUY JAMES MANGANO, P.J.
JOHN COPERTINO
WILLIAM C. THOMPSON
LEO F. McGINITY, JJ.

Argued – March 9, 1998

DECISION & ORDER

* * *

Appendix A

In a proceeding pursuant to CPLR article 78, *inter alia,* to annul two determinations of the respondent, both dated January 22, 1996, which denied the petitioners' respective applications for admission to the respondent, the petitioners appeal from a judgment of the Supreme Court, Nassau County (Ain, J.), entered September 23, 1996, which denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

The petitioners failed to demonstrate a constitutionally-protected interest in membership in Section VIII of the New York State Public High School Athletic Association (*see, Albach v. Odle,* 531 F.2d 983, 984-985; *Archbishop Walsh High School v. Section VI of N.Y. State Pub. High School Athletic Assn.*, 88 NY2d 131, 136). Accordingly, the Supreme Court properly rejected the petitioners' procedural due process claim (*see, Jago v. Van Curen,* 454 US 14; *Board of Regents v. Roth,* 408 US 564).

The petitioners argue that summary disposition by the Supreme Court was premature, and that they are entitled to discovery. This argument ignores both the summary nature of a special proceeding (*see,* CPLR 408, 409[b], 7804[g]; Siegel, NY Prac § 554, at 867 [2d ed]) and the petitioners' contention in the Supreme Court that the matter was ripe for summary disposition.

We have considered the petitioners' remaining contentions and find them to be without merit.

Appendix A

MANGANO, P.J., COPERTINO and THOMPSON, JJ., concur.

McGINITY, J., dissents and votes to reverse the judgment appealed from and to grant the petition and remit the matter for further proceedings consistent herewith, with the following memorandum:

The issue presented on this appeal is whether the denial to the appellants Kellenberg Memorial High School (hereinafter Kellenberg) and Chaminade High School (hereinafter Chaminade) of membership in the respondent, Section VIII of the New York State Public High School Athletic Association, Inc. (hereinafter Section VIII), constitutes a deprivation of the appellants' constitutional rights. The majority, citing *Archbishop Walsh High School v. Section VI of N.Y. State Pub. High School Athletic Assn.* (88 NY2d 131), concludes that the appellants' contentions are without merit and affirm. In my view, an analysis of *Walsh* (*supra*) indicates that the cases are distinguishable, and, accordingly, I dissent.

The appellant Chaminade High School, located in Nassau County, operates a not-for-profit all-male high school with an approximate enrollment of 1,545 students. The appellant Kellenberg Memorial High School, also located in Nassau County, operates a not-for-profit coeducational middle school and high school with an approximate enrollment of 1,600 to 1,700 students.

The respondent is an affiliate of the New York State Public High School Athletic Association, which is a

not-for-profit corporation organized under the aegis of the New York State Commissioner of Education and serves as the organization which coordinates interscholastic athletic programs in the State's public secondary schools. Insofar as relevant here, the constitution of the New York State Public High School Athletic Association provides that "[n]on-public schools may petition and be accepted for full membership". The respondent's constitution provides that "[i]n accordance with the State Association's constitution as interpreted by the court, approved Friends and Neighbors schools may apply and become members of Section VIII if approved by a referendum postcard vote of the member schools of Section VIII". The admission procedures adopted by the respondent for admitting non-public schools to membership include a timely application with an invitation to the applicant to attend a meeting called by the Admissions Review Committee for the purpose of making a presentation to support their application for membership. The respondent's constitution provides that the Admissions Review Committee should include, if possible, representation from the following groups: "Superintendents, High School Principals, Junior High School/Middle School Principals, Modified Association, Council of Administrators, High School Association and a current or former Business Manager". The Admissions Review Committee would then report its findings, and, within a reasonable time thereafter, a vote upon the application must be made by the member schools by a referendum postcard ballot. The referendum postcard ballots, in order to be valid, must bear four separate signatures, to wit, Chief School Officer of the District, Building Principal, Woman Representative of the School,

and Man Representative of the School. Results of the balloting are based on the majority of valid cards received.

Against this background, in March 1995 and in June 1995, Chaminade and Kellenberg, respectively, applied for membership in Section VIII, and the procedures outlined above were followed. Indeed, the Admissions Review Committee, after an on-site visit to the schools, meetings with school administrators, athletic coaches, and student athletes as well as having access to files and financial records, issued major findings with respect to both institutions and concluded with regard to both institutions, "absolutely no recruiting of athletes takes place" and that there was no reason why Chaminade or Kellenberg should not be admitted to Section VIII as full members. The Committee also determined that no scholarships for athletes were available at either institution. Ultimately, after what appears from the record to have been a campaign by some athletic directors from several of the Section VIII schools against Chaminade and Kellenberg, they were denied approval by a majority of votes from Section VIII's member schools (Chaminade 45-12; Kellenberg 40-16, with one abstention), and for that reason alone their applications were denied. The postcard referendum voting, noted above, did not require the insertion of any reason for a member school's decision.

Chaminade and Kellenberg commenced the instant proceeding seeking, *inter alia,* to annul the respondent's determination and, in effect, a declaration that each institution is a member of Section VIII and a direction that Section VIII accept each institution as a full member. The petitioners asserted that the denial of their applications denied

them due process of law, the equal protection of the law, and the right of free association in violation of the Constitutions of the United States and the State of New York.

The Supreme Court, citing the test used by the Court of Appeals in *Walsh* as the rational basis standard, not the strict scrutiny standard, denied the petition, and declared that Section VIII's voting procedure was not violative of Chaminade's and Kellenberg's constitutional rights to equal protection, due process of law, and free association. In a memorandum decision dated June 11, 1996, the Supreme Court stated that "the only basis upon which a potentially meritorious due process argument might be raised by Petitioners in this case would be based upon an assertion that the Respondents, in acting to deny Petitioners' membership applications, classified them on a suspect basis (e.g. religion, race etc.)". The majority would affirm, relying upon the Court of Appeals' determination in *Walsh* (*supra*), as dispositive of the issues raised herein. I believe that the holding in *Walsh* (*supra*) permits a different result herein because the petitioners have raised the issue of possible religious discrimination without benefit of full discovery.

In *Walsh* (*supra*), under almost identical facts, Walsh, a Catholic high school, applied for membership in Section VI, an athletic association run by the State. As in the instant case, Section VI recognized a category of "Friends and Neighbors" schools. Walsh's application was accepted and it met the pertinent special admission procedures. Walsh, however, failed to obtain approval by a majority of votes from Section VI's member schools, and for that reason alone

its application was denied. Walsh commenced a proceeding claiming its right to equal protection had been violated.

In affirming the Appellate Division's declaration that Section VI's referendum requirement did not deprive Walsh of equal protection, the Court of Appeals stated that the actions of Section VI constituted State action, and Section VI must, therefore, comply with applicable equal protection standards. The Court of Appeals further stated that the rational basis standard governed and concluded that the standard had been satisfied. The majority, relying upon *Walsh* (*supra*), contends that Section VIII's referendum voting procedure did not deprive Chaminade and Kellenberg of equal protection of the law.

Of paramount significance to this case, however, is that the Court of Appeals went on to state in *Walsh* (*supra,* 88 NY2d at 137, 139) that:

> "Notably, Walsh's due process claim — that the membership referendum is a 'secret ballot' that is inherently biased against schools like Walsh — is unpreserved. Thus, the legal implications of any belated due process complaint cannot be considered, nor may we even address the accuracy of the asserted factual underpinnings of the theory.
>
> * * *
>
> "In sum, Section VI's membership voting requirement for the enrollment of nonpublic

> schools is a rational screening process on its face, addressed to the particular concerns and issues affecting its otherwise exclusively public schools' membership roster. Finally, nothing in this record supports the assertion or speculation that this voting procedure is intrinsically arbitrary or a subterfuge masking invidious discrimination that would offend the safeguards of the equal protection of the laws of this land. Such factors would present an entirely different case and constitutional theory".

Here, in stark contrast, Chaminade and Kellenberg have asserted that they were denied procedural due process and denied admission based upon the fact that they were Catholic schools. The factual record in the instant proceeding is clearly different. To support their claim, Chaminade and Kellenberg submitted to the court below certain correspondence written by athletic directors opposed to their application that was circulated among the member schools prior to the vote. Ironically, this literature apparently was sent to Friends Academy, a member non-public school which successfully challenged its denial of admission to Section VIII (*see, Matter of Friends Academy v. Section VIII of N.Y. State Pub. High School Athletic Assn.*, 154 Misc 2d 1). This correspondence, which can only be characterized as disturbing in nature, displays an anti-Catholic sentiment, pointedly referring to "The Rosary" as a proffered reason why Catholic school athletic teams in the tri-state area have excelled, and would permit the reader to draw an inference of religious bias. For example, one of the documents posed the following questions:

Appendix A

"Question I:

Why are 8 of the 10 teams in the tri-state area Catholic Schools?

A) Catholics are the best players

B) The Rosary helps

C) They recruit

D) All 6'7" students must go to Catholic H.S.

"If you answer Question #1 wrong, go to Question #2.

"Question II:

Why are 8 of the 10 teams in the tri-state area Catholic Schools?

A) They recruit

B) They recruit

C) They recruit

D) All of the above."

Another document identified Chaminade and Kellenberg as "Select Institutions allowing only the elite to enter" and

schools which "always have the potential to recruit players". That document further identified two other regional Catholic schools that "have openly recruited". However, the Admissions Review Committee specifically made contrary findings, to wit, that the applicants did not recruit athletes.

Yet another document announced a special meeting of coaches to "discuss what action can be taken to eliminate the possibility of the two *Private Catholic Schools* entering into Section VIII athletics" (emphasis supplied).

The Supreme Court held that these documents are not suggestive of impermissible reasons behind the vote to exclude the petitioners and were of no probative value. However, it cannot be said as a matter of law that said statements do not convey a clear message of bias.

On this issue, the case of *St. Augustine High School v. Louisiana High School Athletic Assn.* (270 F Supp 767, *affd* 396 F2d 224), is particularly instructive. There, an all-black private school was denied admission to a Louisiana association which coordinated interscholastic athletics for approximately 400 Louisiana schools, despite having met all standards for membership. The basis for the denial of admittance was the vote of the general membership. In affirming the order that the school be immediately admitted to membership, the Fifth Circuit Court of Appeals noted that the evidence supported the inference that the applicant was denied membership on racial grounds. The court, however, went on to state:

Appendix A

> "We agree with the district court that the LHSAA may establish reasonable and definite (and non-discriminatory) standards for membership. But participation in this state program may not be denied to applicants meeting those standards on the basis of adverse vote by those already fortunate enough to be participants. Thus we construe the word 'arbitrary' as used by the district court in the phrase 'arbitrary vote' to mean a vote to deny membership to an applicant which has met proper and reasonable membership requirements and standards as defined by the Association. If the applicant meets the standards no showing of hands can exclude it from becoming a part of this state activity" (*St. Augustine High School v. Louisiana High School Athletic Assn., supra,* 396 F2d at 228).

Mindful that the New York Court of Appeals in *Walsh* (*supra*) upheld the majority voting procedure of the respondent, nevertheless, in my view, the record as indicated hereinabove supports the assertion that the subject voting procedure which permitted denial of the applications, without explanation, perhaps masked discriminatory reasons. Chaminade and Kellenberg seek the opportunity of discovery to explore their claims of deprivation of safeguarded constitutional rights in order to determine whether in fact the postcard referendum vote which gave no reason for rejection was actually based upon religious bias. They assert that if they are able to show such bias by testimonial and documentary evidence, the strict scrutiny test as alluded to in *Walsh* (*supra*) and *St. Augustine* (*supra*) should apply. If

the applicants cannot make such a showing then the petition shall be dismissed upon the authority of *Walsh* (*supra*).

Accordingly, I respectfully dissent, and vote to reverse the judgment and grant the petition and remit the matter for further proceedings consistent herewith, *inter alia,* to afford the petitioners an opportunity for discovery in order to determine whether the negative vote was in fact arbitrary and rooted in bias.

ENTER:

Martin H. Brownstein
Clerk

APPENDIX B — MEMORANDUM OF THE SUPREME COURT, NASSAU COUNTY DATED JUNE 11, 1996

SUPREME COURT, NASSAU COUNTY

INDEX NO. 4234/96

In the Matter of the Application of

KELLENBERG MEMORIAL HIGH SCHOOL
and CHAMINADE HIGH SCHOOL,

Petitioner(s),

– against –

SECTION VIII OF THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC.

Respondent(s).

MEMORANDUM

BY: STUART L. AIN, J.

DATED: JUNE 11, 1996

MOTION DATE: APRIL 22, 1996

* * *

This is an application pursuant to CPLR Article 78 by which the Petitioners seek, **inter alia**, a declaration that both Petitioners are entitled to membership in the Respondent.

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Both of the Petitioners are not-for-profit educational corporations which operate private secondary schools in Nassau County (Petitioner CHAMINADE HIGH SCHOOL — hereinafter referred to as "CHAMINADE" operates an all boys high school — Petitioner KELLENBERG MEMORIAL HIGH SCHOOL hereinafter referred to as "KELLENBERG" operates a coeducational middle school and high school). Both Petitioners are owned by the Marianist Community of the Province of Meribah, a Catholic religious community.

The Respondent, SECTION VIII of THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC. (hereinafter referred to as "SECTION VIII") is an affiliate of the New York State Public High School Athletic Association which is a not-for-profit corporation organized under the aegis of the New York State Commissioner of Education and serves as the organization which coordinates interscholastic athletic programs in the State's public secondary schools.

Article III of SECTION VIII's Constitution (as modified after the decision of this Court [Segal, J.] in **Matter of Friends Academy v Section VIII of the New York State Public High School Athletic League**, 154 Misc2d 1) provides as follows:

> "Public secondary schools and approved Friends and Neighbors schools housing any of the grades seven (7) through twelve (12) may apply and become members of Section VIII if approved

by referendum postcard vote of the member schools of Section VIII".

This amended provision became effective November 23, 1992.

It is uncontroverted that prior to the amendment and prior to the **Friends Academy** decision, any *public* secondary school in the region was "automatically" a member of SECTION VIII. The only non-public school which has been admitted to SECTION VIII is the Friends Academy, also a non-profit religious school (operated by the Religious Society of Friends) which was admitted notwithstanding a negative referendum vote pursuant to the aforementioned decision of this Court in **Friends Academy v Section VIII**, (154 Misc2d 1, 12).

In March of 1995 and in June of 1995, CHAMINADE and KELLENBERG, respectively applied for membership in SECTION VIII. Thereafter, in accordance with certain "Admission Procedures" contained in SECTION VIII's Bylaws, the Petitioners were afforded an opportunity to and did, in fact, make presentations at various Section meetings and the Petitioner's schools were visited by SECTION VIII's Admissions Review Committee. Upon completion of the "Admission Procedures", the issue of the acceptance or rejection of both Petitioners was submitted to SECTION VIII's member schools for referendum vote in accordance with the quoted provision of SECTION VIII's constitution. Specifically, separate post cards were provided to each member school regarding each Petitioner. The post card simply required each member school to insert the name of

its school and to check an "accepts" or "rejects" box for each Petitioner. The post card also required signatures from four member school officials. The post card did *not* require the insertion of any reason for a member school's decision.

In January of 1996, SECTION VIII informed both of the Petitioners that their applications for membership were denied as a result of the referendum vote.

Upon this Petition, the Petitioners contend that they are entitled to membership in SECTION VIII upon four causes of action:

> FIRST: Denial of both Petitioners' applications was ". . . without any rational basis, was arbitrary, capricious, contrary to law, an abuse of respondent's discretion and unconstitutional" (Petition para. 47, p. 15).
>
> SECOND: Denial violated the Petitioners' rights to "equal protection under the law" (Petition para. 52., p.16).
>
> THIRD: Denial violated the Petitioners' rights to "freedom of religion" (Petition para. 58, p. 17).
>
> FOURTH: Denial violated the Petitioners' rights to free association under the First and Fourteenth Amendments to the United States Constitution as well as the New York State Constitution (Petition para. 62, p.18).

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Although not specifically set forth as a separate cause of action, the Petitioners also allege (under the second cause of action — Paras. 50 & 51 of the Petition) that SECTION VIII denied Petitioners a "property right" to be treated in the same manner as public schools and in the same manner as non-public schools applying for membership. The Court construes this language as intending to raise a "due process" argument and, for purposes of pleading, the Court finds that the "due process" argument has been interposed herein.

Recently, the New York Court of Appeals issued a determination that on remarkably similar facts, no showing had been made of a violation of the Petitioner's right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. In that matter, **Archbishop Walsh High School v Section VI of the New York State Public High School Athletic Association, Inc.**, (__ NY2d __, April 2, 1996), the Petitioner was also a Catholic High School which applied for membership to its regional section of the Public High School Athletic Association. In that matter, Petitioner (**Walsh**) proceeded through what appears to be an Admissions Procedure which is nearly identical to that utilized by SECTION VIII in this case. Ultimately, Petitioner was rejected for admission solely on the basis of a referendum ballot of the member schools. While noting that ". . . participation in a publicly sponsored and supported interscholastic sports association, is not in and of itself a fundamental substantive right under the Constitution (**Albach v Odle**, 531 F2d 983, 984-985)" (**Archbishop Walsh v Section VI**, slip opinion p.4), the Court recognized that the right to equal protection of the law *is* a fundamental right. However, the Court of Appeals found that on the facts

presented in **Walsh**, the standard to be applied in determining whether an equal protection violation existed was the "rational basis" standard. Since, as in this case, the Petitioner, Walsh, had been denied membership solely on the basis of the referendum vote, the issue for the Court of Appeals became whether there was a rational basis for the use of a referendum vote.

In **Walsh**, many of the same arguments advanced by Petitioners herein were before the Court. Principally however, the argument relied upon by the applicant in **Walsh** and the argument seized upon by Judge Titone in his dissent was that the referendum vote, by its nature (because no *reason* for a member's vote is required to be stated) creates the possibility of invidious discrimination.

However, the majority of the Court of Appeals found that Section VI *had* established a rational basis for treating non-public schools differently, once again, based upon virtually identical arguments to those advanced by SECTION VIII in this case. Principally among these being the fact that non-public schools are not restricted to community based enrollment but can and do accept students from a much larger geographic area. This opens up the possibility that non-public schools would be able to obtain a distinct competitive advantage over public schools.

In holding that the referendum vote in **Walsh** was not violative of the equal protection clause, the Court of Appeals was critical of the holding in **Friends Academy v. Section VIII (supra)**. While the Court of Appeals did not expressly overrule **Friends**, it concluded that in relying upon

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St. Augustine High School v Louisiana High School Athletic Association, 270 F.Supp 767, aff'd 396 F2d 224) the **Friends** court essentially misapplied the "strict scrutiny" standard of review reserved for suspect class discrimination cases. In **St. Augustine**, there was evidence to suggest that the applicant school was denied admission to the league because of race. Thus, the Court of Appeals reasoned that the **Friends** court, while espousing a "rational basis" standard, had actually strayed across the line and improperly applied the "strict scrutiny" standard.

As it is beyond **cavil** that this Court is obligated to adhere to and apply the precedents emanating from the Court of Appeals, this Court is obligated to and hereby declares that the referendum voting procedure utilized by SECTION VIII in this case did *not* run afoul of the Petitioners' equal protection rights.

This Court specifically rejects the Petitioners' attempts to distinguish this matter from the **Walsh** matter **vis-a-vis** the equal protection claims. The allegedly distinguishing fact that Section VI had never admitted a non-public school while SECTION VIII had (i.e. Friends Academy as a result of the **Friends** court's determination) is seen by the Court as of little or no significance especially in view of the fact that neither Section VI nor SECTION VIII had ever admitted a non-public school to membership based upon a referendum vote. It strikes the Court as somewhat disingenuous to argue that Friends Academy's admission to membership compared to Petitioners' rejection reflects unequal treatment when the only reason that Friends Academy was admitted was a Court order requiring such admission.

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Turning next to the Petitioners' due process claims, the Court of Appeals took care to note that ". . . Walsh's due process claim — that the membership referendum is a 'secret ballot' that is inherently biased against schools like Walsh — is unpreserved. Thus, the legal implications of any belated due process complaint cannot be considered, nor may we even address the accuracy of the asserted, factual underpinnings of the theory." (**Archbishop Walsh High School v Section VI, supra**, slip opinion No. 74, p.5). Thus, the **Walsh** case is clearly not dispositive of the due process argument made by the Petitioners in this case. However, as noted previously, the Court did also state that ". . . participation in a publicly sponsored and supported interscholastic sports association, is *not* in and of itself, a fundamental substantive right under the Constitution (**Albach v Odle**, 531 F2d 983, 984-985)" (id., p. 4) . Thus, the only basis upon which a potentially meritorious due process argument might be raised by Petitioners in this case would be based upon an assertion that the Respondents, in acting to deny Petitioners' membership applications, classified them on a suspect basis (e.g. religion, race etc. . .).

As an adjunct of their equal protection argument and in an attempt to distinguish their arguments from those advanced in the **Walsh** case, the Petitioners herein argue that the fact that the referendum is a "blind" vote, which requires no specification of a reason for the determination ultimately reached, presents a constitutional violation because the *possibility* exists that the vote would be based upon an impermissible reason, in this case, religion. This, in the Court's view, is the true, central thrust of the Petitioners' argument in this case. The Petitioners do make an *attempt* to

raise the specter that they were denied admission because they are Catholic schools, but viewed in the light most favorable to the Petitioners, this evidence is of no probative value. The three pieces of literature submitted by Petitioners as proof of the material that was being circulated around member schools at or prior to the time of the referendum (exhibits I, J & K annexed to affirmation of John M. Spellman, dated February 16, 1996) reveal that the true thrust of the authors' opposition to Petitioners' admission was the concern that Petitioners' teams would have an unfair competitive advantage over public school teams because Petitioners are able to recruit players while public schools are not and because Petitioners accept students from a much larger geographic area than public schools. Whether or not the fears played upon in these documents are well founded is not a matter for this Court to resolve but the Court is acutely aware that the issue of whether public and private schools can fairly compete with one another was a topic of heated debate in high schools sports circles. The fact remains, however, that these documents are *not* suggestive of an *impermissible* reason behind the vote to exclude the Petitioners. Rather, if one accepts the premise that these documents *are* illustrative of the true reason behind the vote to exclude the Petitioners, the Court can only conclude that the main reason was a fear of unfair competition coupled with a fear of loss of community identity and rivalry in its programs — the very reasons which the Court of Appeals has found state a rational basis for excluding non-public schools (**Walsh, supra**).

Furthermore, to the extent that Petitioners' attempt to raise a First Amendment argument based upon the claim that

in prior litigation (in *1988*) Respondents argued that Petitioner CHAMINADE's admission might be violative of the doctrine of separation of church and state, the Court notes its finding that there is *no* evidence to suggest that that argument has been continued over to this matter, some eight years later. In short, all of the Petitioners' claims of "invidious discrimination" are rejected by the Court.

Having determined that there is no evidence of invidious discrimination, the Court returns its analysis to the Petitioners' claims that a due process violation is established on the facts of this case. Specifically, the Petitioners allege that their due process rights have been violated in two ways:

> "(a) the referendum is an inherently biased vehicle which masks invidious discrimination, and
>
> (b) the failure to provide reasons for disapproval deprives petitioners of the exercise of their right of review" (Affirmation of John M. Spellman, dated April 22, 1996, para. 37 p. 22).

Turning first to the allegation that the referendum is inherently biased, while the Court of Appeals in **Walsh** indicated that it would not pass on **Walsh's** very similar claim because it was not preserved for review, the majority opinion was highly critical of the dissent's suggestion that an open, majority ballot system raises an issue of whether it is used as a mask for invidious discrimination. The Court stated that this argument ". . . rejects as spurious the most elemental hallmark of the democratic process and one of

associative groups — a majority vote . . ." (**Walsh, supra**, slip opinion p.7). While this discussion arose in the context of whether or not the procedure could withstand a rational basis test, the Court nonetheless signalled its intention that, absent some *proof* that the vote was tainted by invidious discrimination (compare **St. Augustine High School v Louisiana High School Athletic Association**, 270 F.Supp 767, *aff'd* 396 F2d 224) and provided that there is a rational basis for the use of a majority vote, the process of a referendum vote passes Constitutional muster. The **Walsh** Court announced its determination that there is a rational basis for the use of the referendum vote and this Court has concluded that that finding is binding upon this Court in this case. Furthermore, as this Court has made the finding that there is no proof of invidious discrimination in this case, the Court also concludes that Petitioners claim that the referendum process violates Petitioners due process rights because it masks invidious discrimination must fail.

This leaves the Petitioners claim that the failure to provide any reason for rejection of their applications (*other* than the majority vote) is a denial of due process because it denies Petitioners "their right of review".

However, as the Respondent correctly points out, procedural due process considerations do not arise unless and until a fundamental right secured under the Constitution is implicated. As noted by the Court of Appeals (and as referred to earlier in this decision) neither education itself nor participation in publicly sponsored interscholastic sports are fundamental substantive rights (**Walsh, supra; Albach v Odle, supra; San Antonio Independent School District**

v Rodriguez, 411 US 1; **O'Connell High School v Virginia High School League**, 581 F2d 81.) Thus, in the absence of a qualifying property or liberty interest, the Court need not consider whether the procedure used in this case (i.e. the referendum vote) satisfies Due Process.

Finally, the Petitioners argue that the Respondent is collaterally estopped from arguing that its referendum vote satisfies the equal protection clause because of the existence of the **Friends Academy** decision issued by this Court (Segal, J.) in 1992. While it is true that the Court of Appeals, in the **Walsh** case, did not expressly overrule **Friends Academy**, the Court was critical of the **Friends Academy** decision **vis-a-vis** the equal protection holding of **Friends Academy** and, in fact, the Court of Appeals reached an opposite conclusion on nearly identical facts. Since this Court is bound to follow the pronouncements of the Court of Appeals, it is constrained to conclude that the decision in **Friends Academy**, at least with respect to the equal protection findings made by the Court, would *not* be followed or enforced as a result of the **Walsh** decision.

Accordingly, the application by the Petitioners for a judgment declaring them to be members of Respondent and annulling the determination of Respondent to deny the Petitioners' membership applications is *denied* and the petition is hereby dismissed.

Settle judgment on notice.

Dated: Mineola, NY

/s/
J.S.C.

APPENDIX C — COUNTER JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU DATED SEPTEMBER 20, 1996 AND ENTERED SEPTEMBER 23, 1996

At a I.A.S. Part 34 of the Supreme Court of the State of New York, held in and for the County of Nassau at the Courthouse located at 100 Supreme Court Drive, Mineola, New York on the 20 day of September, 1996.

PRESENT:

HON. STUART L. AIN
J.S.C.

Index No. 96-004234

In the Matter of the Application of

KELLENBERG MEMORIAL HIGH SCHOOL and CHAMINADE HIGH SCHOOL,

Petitioners,

– against –

SECTION VIII OF THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Respondent.

COUNTER JUDGMENT

Petitioners, Kellenberg Memorial High School ("Kellenberg") and Chaminade High School ("Chaminade"), having commenced this proceeding and action by the filing

of an Order to Show Cause, signed on February 20, 1996, and a Petition, verified the 14th day of February, 1996, which Petition sought a declaration that (i) petitioner, Kellenberg, is a member of the respondent and directing respondent to accept Kellenberg as a member with all the rights and privileges of membership; (ii) that petitioner, Chaminade, is a member of the respondent and directing respondent to accept Chaminade as a member with all the rights and privileges of membership; and (iii) annulling respondent's determination which denied petitioners' applications for membership and directing said respondent to admit petitioners to membership with all the rights and privileges of membership; and which Petition further sought damages against respondent for violation of petitioners' constitutional rights, including, petitioners' rights of equal protection as non-public schools, petitioners' rights of equal protection as Catholic schools, petitioners' rights of freedom of association and petitioners' rights of the due process of law, and petitioners having submitted the Affidavit of Father Philip K. Eichner, S.M., sworn to on February 14, 1996, the Affidavit of James Meehan, sworn to on February 14, 1996, the Affidavit of Brother George Endres, S.M., sworn to on February 14, 1996, the Affidavit of Donald Scarola, sworn to on February 14, 1996, the Affirmation of John M. Spellman, dated February 16, 1996, and all exhibits attached thereto, Petitioner's Memorandum of Law in Support of Petition, dated February 16, 1996, in support of the Order to Show Cause and Petition; and respondent having submitted an Affirmation in Opposition to Order to Show Cause and in Support of Verified Answer to Petition, dated March 1, 1996, an Affidavit in Opposition to Order to Show Cause and in Support of Verified Answer to Petition, sworn to on

March 1, 1996, and a Verified Answer and Objections in Point of Law, verified on March 1, 1996, in opposition to the Order To Show Cause and Petition; and petitioners having submitted a Reply Affirmation, dated March 21, 1996, and a Reply Memorandum of Law in Further Support of the Petition, dated March 21, 1996, in further support of the Order To Show Cause and Petition; and respondent having submitted a Sur-Reply Affirmation, dated April 17, 1996, and a Memorandum of Law Accompanying Sur-Reply Affirmation on Behalf of Respondent, Section VIII of the New York State Public High School Athletic Association, Inc., dated April 14, 1996, in further opposition to the Order To Show Cause and Petition; and petitioners having submitted an Affirmation, dated April 22, 1996, in further support of the Order To Show Cause and Petition; and this Court having issued a Memorandum Decision, dated June 11, 1996,

NOW, on the motion of Spellman & Walsh, counsel for petitioners, it is hereby

DECLARED, ADJUDGED and DECREED, that respondent's referendum voting procedure is not violative of petitioners' constitutional rights to equal protection; and it is further

DECLARED, ADJUDGED and DECREED, that respondent's referendum voting procedure is not violative of petitioners' constitutional rights to due process of law; and it is further

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DECLARED, ADJUDGED and DECREED, that respondent's referendum voting procedure is not violative of petitioners' constitutional rights to free association; and it is further

ADJUDGED, that the application by the petitioners for a Judgment declaring them to be members of respondent and annulling the determination of respondent to deny the petitioners' membership applications is denied; and it is further

ADJUDGED, that the Petition is dismissed.

ENTER:

s/ [illegible]
J.S.C.

APPENDIX D — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL DATED SEPTEMBER 2, 1999

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second ***day of*** September 1999

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 821

In the Matter of Kellenberg Memorial
High School et al.,

Appellants,

v.

Section VIII of the New York State Public High School
Athletic Association, Inc.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

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ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court